Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 87-935

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1987

STATE OF ALABAMA,

Petitioner,

v.

KENNETH JOSEPH FORTIER, JR.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

# RESPONDENT'S BRIEF
# IN OPPOSITION TO CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the prosecution, in order to avail itself of the inevitable discovery exception to the exclusionary rule, must prove inevitable discovery by "demonstrated historical facts capable of ready verification or impeachment"?

2. Whether the state appellate court findings and conclusion that the prosecution did not meet its burden of establishing by a preponderance of the evidence that evidence obtained in violation of Respondent's rights inevitably would have been discovered by lawful means should be respected?

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## OPINIONS BELOW

The statement of the opinions below contained in the certiorari petition is correct.

## JURISDICTION

Petitioner seeks review of the judgment of a state court of last resort in a criminal case pursuant to 28 U.S.C. Section 1257(3). The certiorari petition was filed more than sixty (60) days after the entry of judgment by the Supreme Court of Alabama, and the period of time for applying for a writ of certiorari has not been extended by a Justice of this Court. Petitioner's application for a writ of certiorari is out of time and jurisdiction should be declined.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

(1) Fourth Amendment to the United States Constitution, which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2) The Fifth Amendment to the United States Constitution which provides: "No person shall ... be compelled in any criminal case to be a witness against himself...."

(3) Rule 20.1, Rules of the Supreme Court of the United States, which provides:

"A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort ... shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of

certiorari in such cases for a period not exceeding 30 days."

(4) Article I, Section 5 of the Alabama Constitution of 1901, which provides: "That the people shall be secure in their persons, houses, and papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

(5) Section 15-5-3. Code of Alabama, which provides: "A search warrant can only be issued on probable cause, supported by an affidavit naming and describing the person and particularly describing the property and the place to be searched."

## STATEMENT OF THE CASE

### Procedural Background

The July 1984 term of the Tuscaloosa County, Alabama Grand Jury returned an indictment against Respondent, Kenneth Joseph Fortier, Jr., charging him with robbery in the first degree. Fortier entered a plea of not guilty. Fortier was tried before a jury and was found guilty of robbery in the first degree. Fortier was sentenced under the Alabama Habitual Felony Offender Law to life imprisonment without possibility of parole.

The Alabama Court of Criminal Appeals reversed Fortier's conviction and remanded the case for a new trial. The Alabama Court of Criminal Appeals based its holding upon a finding that incriminating evidence introduced at

trial was found as a direct result of police interrogation of Fortier after he had unequivocably invoked his right to counsel.[1] On rehearing, the Alabama Court of Criminal Appeals specifically rejected the State of Alabama's argument that the incriminating evidence should have been admitted under the inevitable discovery exception to the exclusionary rule because it found that the State of Alabama had failed to meet its burden of establishing that the incriminating evidence inevitably would have been discovered by lawful means. The Alabama Court of Criminal Appeals quoted this Court as follows: "'Inevitable discovery

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[1] Respondent also argued that the evidence was obtained through an involuntary consent to search. However, the Alabama Court of Criminal Appeals did not address that question because it reversed on the basis referred to hereinabove.

involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment....'" Nix v. Williams, 467 U.S. [431,] 445 n.5 (1984). The Alabama Court of Criminal Appeals found:

> "There was no evidence presented in the present case to prove that, absent the illegal questioning of the defendant as to the whereabouts of the gun, the police would have obtained a warrant for the place where the weapon was found and would have eventually located the gun. The prosecution simply did not meet its burden of proof. Nix v. Williams, 467 U.S. at 444, 104 S.Ct. at 2509 (the prosecution must 'establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means')...." (Emphasis in original)

The State of Alabama filed a petition for writ of certiorari with the Supreme Court of Alabama on June 23,

1987.[2] The Supreme Court of Alabama denied the State of Alabama's petition

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[2] Rule 39 (k) of the Alabama Rules of Appellate Procedure provides:

> "[t]he review of [decisions of the Alabama Court of Criminal Appeals by the Supreme Court of Alabama] will ordinarily be limited to the facts stated in the opinion of the [Alabama Court of Criminal Appeals]. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to the request, petitioner may copy the statement in the petition to ...[the Supreme Court of Alabama] with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the ... [Alabama Court of Criminal Appeals], if found to be correct."

In its application for rehearing with the Alabama Court of Criminal Appeals, the State of Alabama did not file any request for additional or corrected facts pursuant to Rule 39(k) of the Alabama Rules of Appellate Procedure.

for writ of certiorari on September 25, 1987.[3]

## Factual Background

The summary of the trial evidence contained in the opinion of the Alabama Court of Criminal Appeals is essentially

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[3] Rule 41(b) of the Alabama Rules of Appellate Procedure provides:

> "The timely filing of a petition for writ of certiorari in the ... [Alabama Supreme Court] shall stay the issuance of the certificate of judgment by the ... [Alabama Court of Criminal Appeals]. Upon the filing of a copy of an order of the ... [Alabama Supreme Court] denying the petition for certiorari, the certificate of judgment of the ... [Alabama Court of Criminal Appeals] shall issue immediately...."

Respondent, on or about November 25, 1987, filed a motion with the Alabama Court of Criminal Appeals requesting a stay of judgment, or, alternatively, seeking to have the execution of the judgment withdrawn. That motion was denied by the Alabama Court of Criminal Appeals on November 30, 1987.

correct.

Prior to trial, Respondent filed a motion to suppress evidence. (R. 436-437). The following was adduced at a pretrial hearing on that motion:

Larry Montgomery, a sergeant with the University of Alabama Police Department, was called around 2:00 a.m. on July 22, 1984 and informed that a robbery had been committed by two black males and that a white female had been in the area of the robbery and was believed to have been with the two black males at the time of the robbery. (R. 4). According to Montgomery, the robbery had occurred shortly after 1:00 a.m. that day. (R. 5). Montgomery testified that he was called back around 5:30 or 6:00 a.m. that morning and informed that the Tuscaloosa, Alabama Police Department had

three suspects in custody. (R. 4). According to Montgomery, around 4:00 a.m. officers with the Tuscaloosa Police Department had stopped a white female, Tammy Gamso, matching the description of the white female believed to have been with the two black male robbery suspects after she attempted to use a credit card stolen from one of the robbery victims. (R. 5). While the Tuscaloosa Police were questioning Gamso on the scene, two black males, Wayne Donnell Jones, and Fortier, drove up in a Mercedes-Benz which, according to Montgomery, matched the description of an automobile near the scene of the robbery. (R. 5, 6). The Tuscaloosa Police took Jones and Fortier into custody also. (R. 6).

Montgomery testified that he arrived at the University Police Station around

6:00 or 6:30 a.m. and that he first read Fortier his Miranda rights and Fortier responded that he did not want to make any statements without a lawyer present. (R. 6-7). At 7:03 a.m., Fortier signed an explanation of rights form and indicated that he did not want to make a statement without a lawyer being present. (R. 7, 16).

Montgomery then had Jones and Gamso brought into his office. He talked with them for two to two and a half hours and obtained statements from them. (R. 6, 16).

Montgomery had obtained a receipt from Mack's Bait Shop for a 380 caliber chrome finish automatic pistol from Fortier. (R. 8) Around 9:00 or 10:00 a.m., Montgomery had Fortier brought back to his office. According to

Montgomery, his purpose for doing so was "[t]o explain the procedure for going on a search warrant to him and to make sure that he had an understanding." (R. 19). Fortier testified that Montgomery told him that he had taken statements from Jones and Gamso and that he wanted him to make a statement about the robbery. (R. 29). Fortier also stated that Montgomery asked him questions about whether the gun purchased from Mack's Bait Shop had been used in the robbery. (R. 29). In regard to searching anything, Montgomery testified that he did not think he discussed obtaining a search warrant for Fortier's automobile. (R. 16-17). However, Fortier testified that Montgomery did say that they would like to search his car and that, in doing so, they would remove the seats and go

through the entire car. (R. 23-24). At the time of this second encounter between Montgomery and Fortier, Montgomery had two addresses for Fortier. (R. 8-9). Montgomery was aware that one of the addresses was that of Fortier's aunt. (R. 17). Montgomery testified: "He told me that his aunt and I believe his grandmother also lives there. He didn't tell me their age. I assumed at least the grandmother was maybe an elderly lady." (R. 17). Fortier testified that his aunt was in her sixties and that his grandmother was ninety-three and in bad health. (R. 24). Montgomery "explained" the procedure for writing up a search warrant to Fortier. (R. 9). He stated that he told Fortier that he "would have to make out an affidavit and get the warrant judge out

of bed .. to issue a search warrant" and "explained to him also how much trouble it was to write one up ... since he didn't write that many..." (R. 9). Montgomery testified that he told Fortier that he would have to go to his aunt's house and search every part of the house that was large enough to contain a handgun and that if he didn't find it he would have to go through everything in the house and would move whatever was in the way. (R. 10, 18, 20). According to Montgomery's own testimony, "it seemed to bother [Fortier] that [he] would have to go down" to his aunt's house. (R. 11). Montgomery said he based his conclusions upon "[p]erception mostly, [Fortier's] mannerisms and the way he acted after [he] explained the search warrant procedure to him." (R. 11). Montgomery

testified that during this second encounter with Fortier, he divided his time between "explaining search warrant procedure to Fortier and looking for forms, affidavits, and everything." (R. 18). Montgomery did not state that he told Fortier that he had a right not to consent to the search. Montgomery stated that he had started writing an affidavit for a search warrant when Fortier told him that he would take him and show him where the gun was located. (R. 11-12). Fortier testified that although Montgomery had not used the words "tear up" he felt that his aunt's house would be torn up if searched. (R. 27). He stated that he did not want to put his grandmother through the pain of the police looking through the house. (R. 28). He said that he felt intimidated

and that he did not want them to tear up his aunt's house because his grandmother was quite old and in bad health. Fortier further stated that because of his intimidation, he agreed to take Montgomery to the gun. (R. 24). Around 11:00 a.m. or 11:30 a.m. Fortier took Montgomery and a Tuscaloosa policeman to his apartment (not his aunt's house) and showed them the location of the gun. (R. 12-13).

The Circuit Court of Tuscaloosa County denied Fortier's motion to suppress. (R. 30).

Larry Montgomery's testimony at trial was similar to his testimony at the suppression hearing. He testified that he first received information concerning the robbery around 2:15 or 2:30 a.m. and that his next contact with

the case was around 5:30 or 6:00 a.m. when he recieved information that three suspects were in custody. (R. 126-127). Montgomery testified that he spoke with Fortier and read him his Miranda rights. (R. 128). Montgomery indicated that he had already obtained a statement from Gamso and that he subsequently obtained a statement from Jones. (R. 129). Montgomery testified that between 9:30 and 10:30 a.m., he saw Fortier again and informed him of the possibility of obtaining a search warrant, told Fortier what he was looking for, and received permission to search from Fortier. (R. 130).[4] Outside the presence of the jury,

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[4] At that point, testimony was presented outside the presence of the jury, and, apparently, a transcript of the pretrial suppression proceedings was offered for the consideration of the trial judge (a different judge than the one who presided over the pretrial

Montgomery again testified that he read Fortier his Miranda rights. (R. 161). His testimony indicated that at 7:03 a.m., Fortier gave a written statement that he did not wish to make a statement without a lawyer present, that he stopped questioning Fortier, and that Fortier was taken back to the patrol supervisor's office. (R. 161, 165, 166). Montgomery testified that between 9:30 and 10:30 a.m., after he had talked with Jones, he had Fortier brought back to his office. (R. 162, 166, 167, 168). According to Montgomery he had two addresses for Fortier. (R. 162, 163). Montgomery testified that he explained to Fortier that he did not want him to answer any questions but with his rights in mind

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suppression hearing). (R. 130-132, 133-160).

just wanted to explain something to him about search warrant procedure and what would be involved in a search of his apartment and his aunt's house. (R. 161, 167, 168). Montgomery testified that he touched on Fortier's apartment but started with his aunt's house. (R. 167). According to Montgomery, he explained that in searching Fortier's aunt's house he would have to look through everything in the house that would contain an object small enough to handle a gun. (R. 163). Montgomery testified that he had started writing up an affidavit when Fortier stopped him and said that he would show him where the gun was located and that he took him to his apartment and showed him the gun. (R. 163). Montgomery did not obtain a written waiver from Fortier pertaining to the search for the gun. (R.

170). The trial judge ruled the evidence to be admissible. (R. 170). Back in the presence of the jury, Montgomery again related the process of his talking with Fortier and obtaining the gun. (R. 123-180). As to his start on an affidavit, Montgomery testified that he had only begun an introductory paragraph containing his own biographical information. (R. 176). The gun and clip were introduced into evidence. (R. 180).

## REASONS FOR DENYING THE WRIT

### 1. The petition was not timely filed.

Under Rule 20.1 of the Rules of this Court, a petition for writ of certiorari to review the judgment of a state court of last resort is due to be filed within sixty (60) days of the entry of such judgment. In this case, the judgment of the Alabama Supreme Court denying the State of Alabama's petition for writ of certiorari was entered on September 25, 1987. The State of Alabama's certiorari petition in the instant proceeding shows a certificate of service of November 25, 1987, sixty-one (61) days after the Alabama Supreme Court's denial of the State of Alabama's state certiorari

petition.[5] The State of Alabama's certiorari petition in the instant proceeding was not received by the Clerk of this Court until November 30, 1987, sixty-six (66) days after the Alabama Supreme Court's denial of the State of Alabama's state certiorari petition. Thus, the State of Alabama's certiorari petition in the instant proceeding was not timely filed. For that reason, Respondent submits that the petition should be denied.

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[5] Counsel for Respondent has not received a copy of a notarized statement of counsel for Petitioner setting forth the details of the mailing of Petitioner's certiorari petition. Counsel for Respondent did not receive a copy of Petitioner's certiorari petition until December 1, 1987. The envelope in which the undersigned counsel received the copy of Petitioner's certiorari petition was not postmarked until November 30, 1987.

2. The inevitable discovery question was properly decided below and is not significant enough for certiorari review anyway.

The Alabama Court of Criminal Appeals based its reversal of Respondent's conviction upon a finding that incriminating evidence introduced at trial was found as a direct result of police interrogation of Respondent after he had unequivocably invoked his right to counsel. On rehearing, the Alabama Court of Criminal Appeals specifically rejected Petitioner State of Alabama's argument that the incriminating evidence should have been admitted under the inevitable discovery exception to the exclusionary rule because it found that Petitioner had failed to meet its burden of establishing that the incriminating evidence inevitably would have been

discovered by lawful means.

The State of Alabama incorrectly posits that the Alabama Court of Criminal Appeals applied a test for determining inevitable discovery which does not comport with this Court's holding in Nix v. Williams, 467 U.S. 431 (1984). To the contrary, the Alabama Court of Criminal Appeals did not deviate from this Court's holding in Nix v. Williams, 467 U.S. 341. In accordance with this Court's holding in Nix v. Williams, 467 U.S. 341, the Alabama Court of Criminal Appeals simply and properly focused its evaluation of the evidence to historical facts demonstrated, or not demonstrated, as the case may be, by the State of Alabama rather than resort to speculation. The Alabama Court of Criminal Appeals quoted from this

Court's opinion in Nix v. Williams, 467 U.S. 431, as follows: "'Inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment....' Nix v. Williams, 467 U.S. [431,] 445 n.5 (1984)." The Alabama Court of Criminal Appeals held the State of Alabama to this requirement.

Applying the proper rule of law to the facts, the Alabama Court of Criminal Appeals found:

> "There was no evidence presented in the present case to prove that, absent the illegal questioning of the defendant as to the whereabouts of the gun, the police would have obtained a warrant for the place where the weapon was found and would have eventually located the gun. The prosecution simply did not meet its burden of proof. Nix v. Williams, 467 U.S. at 444, 104 S.Ct. at 2509 (the prosecution

> must 'establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means')...." (Emphasis in original)

Petitioner is simply wrong about the evidence. The State of Alabama failed to adduce "historical facts capable of ready verification or impeachment" sufficient to warrant a conclusion that there was even a reasonable probability much less an absolute certainty that the incriminating evidence would have been obtained but for the violation of Respondent's rights.

The gun and clip could not have been properly seized from the apartment without a valid search warrant or valid consent. Here, there was not sufficient evidence to support a conclusion that a search warrant would have been issued and

that the gun and clip would have been located, identified, and recovered. Although Montgomery had worked for the University of Alabama Police Department for quite a while, his testimony that securing a search warrant would have been troublesome because he did not write that many affidavits indicates a critical lack of experience in the procedures for obtaining search warrants. Montgomery's testimony indicated that he had only been able to compose one paragraph containing his own biographical information. There was no evidence of what Montgomery contemplated including in the affidavit he was supposedly preparing for the purpose of securing a search warrant. Other than the various addresses given or listed for Fortier, there was no evidence as to what, if any, information

Montgomery possessed, prior to the illegal interrogation, that would lead to a belief that the gun might be located at any particular location. Indeed, there was no evidence presented to indicate that prior to the illegal interrogation Montgomery possessed any information specifically indicating that the gun was located at one of the various addresses given or listed for Fortier. There was no evidence of exactly what particular address Montgomery intended to be the subject of an affidavit and search warrant.[6] And, there was no evidence of exactly what forms -- correct forms or

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[6] The place to be searched would have to have been particularly described. Fourth Amendment to the United States Constitution; Article I, Section 5, Alabama Constitution of 1901; Section 15-5-3, Code of Alabama. Thus, Respondent submits that the listing of alternative addresses or places would not have been legally sufficient.

incorrect forms -- Montgomery contemplated using in connection with seeking the issuance of a search warrant. Thus, the State of Alabama failed to prove by demonstrated historical facts that any affidavit and forms prepared by Montgomery would have been sufficient to support the issuance of a search warrant under the Fourth Amendment to the United States Constitution; Article I, Section 5 of the Alabama Constitution of 1901; and Section 15-5-3, Code of Alabama. Moreover, Montgomery did not testify that he would have gone on with the process of attempting to obtain a search warrant if Fortier had not given in and taken him to the apartment.[7] Nor was

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[7] The Alabama Court of Criminal Appeals did not address the question of whether Fortier's "consent" to the

there any evidence of what the normal procedure or routine of the University of Alabama Police Department would have been

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search was valid. At the time Fortier gave his consent, he was in custody. He had not previously cooperated with the police. In fact, after being advised of his Miranda rights, he responded that he did not want to make any statements without a lawyer present and signed an Explanation of Rights form and indicated thereon that he did not want to make a statement. Montgomery, who knew that Fortier's grandmother lived with his aunt and who correctly assumed that Fortier's grandmother was elderly, indicated to Fortier that if Fortier did not consent that he would search his aunt's house and in doing so greatly disturb the solicitude of the house. According to Montgomery's own testimony, this specter bothered Fortier. Fortier related that this did bother him and that he felt intimidated and for those reasons agreed to take Montgomery to the gun. Respondent submits that under these circumstances, his consent was not voluntary. Respondent submits that a conclusion can be drawn from the evidence that Montgomery did not have the intent of actually going through with the process of applying for a search warrant but rather used his "search warrant talk" with Fortier as a part of his interrogation effort.

in such situations. Additionally, the State of Alabama did not firmly establish that the gun and clip would have remained in their location until a search warrant could have been obtained. Thus, the State of Alabama simply failed to elicit historical facts sufficient to warrant a conclusion by a preponderance of the evidence that the incriminating evidence inevitably would have been obtained in a legal manner.

Finally, regardless of whether the evidence did or did not support a finding of inevitable discovery, this Court should not grant certiorari merely to review state appellate courts' interpretation of the facts in a particular case and application of the law to particular facts.

## CONCLUSION

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I, Thomas Martele Goggans, a member of the Bar of the Supreme Court of the United States, hereby certify that on this date, December 28th, 1987, I did serve the requisite number of copies of the foregoing upon counsel for Petitioner, by mailing the same, first class postage prepaid and addressed as follows:

Don Siegelman
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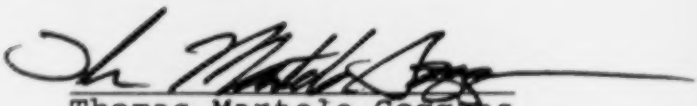

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